

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

VOL. I, NO. 3

JUNE 2003

THE “FEENEY AMENDMENT” TO THE SENTENCING GUIDELINES AND THE PROTECT ACT OF 2003 (Effective April 30, 2003)

On April 30, 2003, the president signed into law the federal “Amber Alert” statute, addressing child abductions and other offenses against minors, entitled the “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ” or the “PROTECT Act.” Most of its provisions are effective immediately upon enactment.

When the initial bill first reached the House of Representatives, an amendment - - called the “Feeney Amendment” -- was attached to it, addressing “sentencing reform” issues. The first incarnation of the amendment made sweeping changes to the sentencing guidelines and restricted the court’s authority to depart downward (not upward) across all offense types. It overruled Koon v. United States, 518 U.S. 81 (1996), and established burdensome reporting requirements clearly intended to intimidate judges into not imposing sentences below the range without approval of the government. There was virtually no public debate (it lasted all of 20 minutes) and no notice to the federal judiciary, the U.S. Sentencing Commission, the defense bar or the legal academic community.

A frenzied attempt to defeat or at least table the amendment ensued, which

included a letter from Chief Justice Rehnquist urging the Senate Judiciary Committee to allow for meaningful public debate before making such sweeping changes and reversing over 15 years of developing sentencing law under the guidelines scheme. Despite these efforts, the amendment ultimately passed, but in a version that was somewhat less sweeping and that restricted judges’ discretion to depart downward only in the category of cases entitled “child crimes and sexual offenses.” The amendment, however, also directed the Sentencing Commission to amend the guidelines so as to “ensure that the incidence of downward departures are [sic] substantially reduced.” Therefore, it remains to be seen how the Commission will respond to this directive, and whether it will effectively restrict downward departures across all offense types in the current amendment cycle. What follows are the highlights of the “Feeney Amendment” and the PROTECT Act.

FEENEY AMENDMENT HIGHLIGHTS

A. Downward departures for “child crimes and sexual offenses” are now restricted to those grounds that are “affirmatively and specifically identified as a permissible ground” in Part 5K of the sentencing guidelines. Congress directly amended § 5K2.0 to add a section specifically addressing this category of cases, and to add § 5K2.22, which sets forth certain prohibited grounds for this category of cases. “Child crimes and sexual offenses”

is defined to include kidnapping a minor (18 U.S.C. § 1201), sex trafficking of children (18 U.S.C. § 1591), obscenity (18 U.S.C. § 1460 et seq.), sexual abuse (18 U.S.C. § 2241 et seq.), sexual exploitation of minors (includes receipt or possession of child pornography) (18 U.S.C. § 2251 et seq.), and transportation for illegal sexual activity (18 U.S.C. § 2421 et seq.). Permissible downward departure grounds for this category of cases, specified in Part 5K of the guidelines, include age (if and to extent permitted by § 5H1.1), extraordinary physical impairment (if and to extent permitted by § 5H1.4), lesser harms (§ 5K2.11), coercion and duress (§ 5K2.12), and voluntary disclosure of offense (§ 5K2.16). Prohibited downward departure grounds for this category of cases include gambling dependence, aberrant behavior, extraordinary family circumstances, diminished capacity, over representation of offense seriousness or criminal history, and any unmentioned factors (since they are not specifically and affirmatively identified in Part 5K), such as post-offense rehabilitation, extraordinary acceptance of responsibility, etc. Downward departures are still presently available for all other offense types, such that the same heartland and combination of circumstances analysis in § 5K2.0 and Koon applies. However, we must watch closely how the Sentencing Commission responds to this new directive that it amend the guidelines to ensure a reduction in the number of downward departures. Moreover, the amendment specifies that for the next 2 years, the Commission is prohibited from passing new downward departure grounds or amendments inconsistent with the new departure restrictions.

B. The amendment directs the Commission to amend the guidelines within

180 days of enactment to add a new 4-level downward departure in illegal reentry cases only for border districts with “fast track” or “early disposition programs authorized by the Attorney General” and only pursuant to a government motion. This will impact districts that have a “fast track” program in place, because the downward departures, pursuant to government motions, were typically far in excess of 4 levels.

C. The third acceptance of responsibility point under § 3E1.1 will *only be available pursuant to a government motion* based on timely acceptance that allows the government to spare its resources by not preparing for trial. The alternative third-point ground, that of timely disclosing the defendant’s offense conduct (the “*mea culpa*” ground), has been repealed. The amendment prohibits the Commission from ever altering this change.

D. The amendment directly amends the pornography guidelines by adding a broader definition to the enhancement for “pattern of activity involving prohibited sexual conduct” in § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), and it enhances penalties for the number of visual depictions and sadistic or masochistic depictions in § 2G2.4 (Child Pornography Guideline). The amendment prohibits the Commission from ever altering these changes.

E. The amendment seeks to chill all departures generally by imposing burdensome reporting requirements on judges who depart. In the “Reasons For Imposing Sentence” section of the judgment and commitment order, the judge must set forth factually specific written reasons for departing (except in cooperation cases), and the Chief Judge of each district must ensure

that the reasons for departing are forwarded to the Sentencing Commission within 30 days of imposition. It further chills departures generally by giving Congress and the DOJ full access to Sentencing Commission data identifying each judge's departure practices. It also requires the Commission to report annually to Congress about national departure trends, including identifying uncooperative districts not forwarding written reasons for departures.

F. The amendment again seeks to chill downward departures specifically by requiring the DOJ to establish written procedures, and to forward those procedures to Congress within 90 days of enactment, to ensure that downward departure motions are formally opposed by line assistants, that prosecutors make sufficient records for appeal, and that appeals are filed when judges depart downward based on the nature or magnitude of the sentencing error, its prevalence in the district, or its "prevalence with respect to a particular judge." If DOJ fails to submit the above written procedures to Congress within 90 days of enactment, then beginning on the 91st day, the Attorney General must report every downward departure (other than cooperation or "fast track" motions filed by the government) within 15 days of imposition of sentence, including the identity of the judge, the facts of the case, the reasons for the downward departure, whether the prosecutor opposed the departure, and whether the government is appealing the departure.

G. The amendment establishes a changed standard of review of departures on appeal, such that departures are to be reviewed *de novo*. This overrules the Koon decision and the longstanding "abuse of discretion" standard in which due deference was given to

the sentencing judge, and it means that the appellate court must exercise *de novo* discretion without the benefit of seeing the defendant and the live witnesses.

The amendment also restricts sentences upon remand, such that at the resentencing hearing, judges can only depart on those grounds that were raised at the original sentencing hearing that were "specifically and affirmatively included in the written statement of reasons" and found permissible by the appellate court.

H. The amendment changes the enabling legislation to provide that "not more than 3" voting members can be judges. Previously, it provided that "at least 3" had to be judges. This change means that federal judges will no longer be able to have a majority among the 7 voting members of the U.S. Sentencing Commission.

I. Most provisions of the Feeney Amendment became effective immediately upon enactment, April 30, 2003, which raises a multitude of *ex post facto* issues. Remember to always compare the law in effect at the time of commission of the offense with the law in effect at the time of sentencing. A reduction in the extent of sentencing discretion should be deemed a substantive change for *ex post facto* purposes. Lindsey v. Washington, 301 U.S. 397 (1937) (new law imposing mandatory sentence, restricting court's sentencing discretion, violated *ex post facto* principles). Therefore, the new restrictions on departing downward do not apply unless the offense conduct occurred on or after April 30, 2003, the effective date of the statute.

It is less clear how *ex post facto* principles apply to the appellate changes made by the Feeney Amendment. Do the changes apply only to departures imposed

after April 30, 2003, or to pending appeals as well? The changed standard of review on appeal (de novo) is arguably substantive because it reduces the burden the government has when it appeals a downward departure. The language in Carmell v. Texas, 529 U.S. 513 (2000), may be helpful in this regard. That case found that a changed rule of evidence, which eliminated the need for corroboration of a witness' testimony, violated ex post facto principles. However, these complicated issues will have to be resolved by the courts. Nevertheless, it seems fairly clear that the restricted departure grounds applicable to resentencings after remand violate ex post facto principles. See United States v. Yeaman, 248 F.3d 223, 227-28 (3d Cir. 2001) (the prohibition on departing downward for post-sentence rehabilitation at § 5K2.19 did not apply, because this restriction on sentencing discretion was not in effect at time of commission of offense). It is likewise unclear how ex post facto principles apply to the burdensome reporting requirements imposed upon judges who depart. This is arguably an Article III, separation of powers violation, but does a criminal defendant have standing to raise this challenge? Perhaps so, if the record reflects that the court's decision not to depart was because it did not have the time or inclination to comply with the reporting requirements.

PROTECT ACT HIGHLIGHTS

A. Aside from the "sentencing reforms" made by the Feeney Amendment, the broader statute contains numerous provisions that enhance penalties for offenses against minors. For the category of cases defined as "child crimes and sexual offenses," many of the statutory maximums and minimums have been enhanced, and the authorized supervised release term for all

such offenses is increased to "any term of years or life."

B. The base offense level in § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) is increased from Level 24 to Level 32 across the board, regardless of whether the victim is a minor or an adult. The 1-level decrease for releasing the victim within 24 hours in subsection (b)(4)(C) is repealed. The 3-level enhancement for sexually assaulting the victim in subsection (b)(5) is increased to 6 levels, whether the victim is a minor or an adult.

C. A 20-year mandatory minimum has been added to 18 U.S.C. § 1201(g), the kidnapping statute for offenses involving minor victims. The minimum appears to apply even to first offenders, but does not apply if the defendant was a relative or legal guardian of the victim.

D. 18 U.S.C. § 3559 has been amended to add a new "two strikes" provision which carries a mandatory life sentence for the second conviction of a "federal sex offense" involving a minor victim.

E. 18 U.S.C. § 3283 has been amended to provide that no statute of limitations applies to the prosecution of an offense involving the sexual or physical abuse, or kidnapping, of a child under 18 years, for the duration of that child's life.

F. The act directs the Attorney General to appoint 25 prosecutors whose "primary focus" will be the investigation and prosecution of federal child pornography and obscenity laws. The Attorney General will be required to report to the House and Senate Judiciary Committees on his enforcement actions.

G. The act adds § 2252B to Title 18, which prohibits using misleading domain names on the internet with intent to deceive a person into viewing obscene material or a minor into viewing material harmful to minors.

H. The act adds § 25 to Title 18, which enhances penalties for using minors in crimes of violence. For the first conviction, the statutory maximum penalty and the maximum fine is doubled. For subsequent convictions, the statutory maximum penalty and the maximum fine is tripled.

Special thanks to Felicia Sarner from the Eastern District of Pennsylvania for this cogent synopsis.

UNITED STATES SENTENCING COMMISSION WEB SITE

The Federal Sentencing Guidelines Manual, including recent amendments, is available at the United States Sentencing Commission's web site. It may be found at www.ussc.gov under "Publications." The web site is user friendly, and it allows easy access to pertinent sections of the guidelines, commentary and application notes. Many clients ask for copies of the guidelines that apply to their cases, and the site provides easy access/printing for these needs.

DRUG TRAFFICKING CONSPIRACY DEFENSE PRIMER

The Defender Services Training Branch has re-instituted its regular newsletter publications at www.fd.org. Under "Recent Publications" you will find a defense primer for drug trafficking conspiracy cases called "Drug Trafficking Conspiracies: The Best Defense Is An Aggressive Offense." Part I is

found in the Summer 2000 edition. Part II is found in the Winter 2003 edition. The primer outlines defense strategies in a federal drug case, from discovery, through pre-trial and trial, and sentencing.

REVERSIBLE ERRORS - 2003

Alex Bunin, the Federal Public Defender for the Northern District of New York and the District of Vermont, has issued his Reversible Errors 2003 Edition. The publication is over 50 pages in length, and provides case citations and descriptive bullets of all courts of appeals criminal cases that were remanded because of reversible error. The case listing has subject-matter headings and is a great research tool.

There are over 180 Criminal Justice Act panel attorneys here in the Northern District of West Virginia, and it would be cost prohibitive to copy and mail this edition to everyone. However, the Federal Public Defender Office will e-mail the publication as a PDF. attachment to anyone with an interest. Please call (304) 622-3823; provide your e-mail address; and the Reversible Errors 2003 Edition will be forwarded.

FOURTH CIRCUIT ROUND-UP

The following listing includes recent published cases from the Fourth Circuit Court of Appeals:

United States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003).

- Panel decides that post-*Daubert* Fourth Circuit precedent precludes panel from lifting per se exclusion of polygraph test results at trial; en banc ruling necessary to address whether *Daubert* effectively overturns this per se exclusion.

United States v. Newsome, 322 F.3d 328 (4th Cir. 2003).

- In a multi-defendant conspiracy, the Court distinguishes between the relevant conduct analysis used to determine “loss,” and the analysis used to determine restitution due following convictions for conspiracy to steal government property.

United States v. Thorton, 325 F.3d 189 (4th Cir. 2003).

- Court addresses circuit split issue: Whether the New York v. Belton search of passenger compartment of a vehicle incident to arrest doctrine applies when the defendant has already exited the vehicle before the police contact is initiated?

- Court will employ the Belton doctrine when it can be established that there was close proximity, both temporally and spatially, between defendant and vehicle at time of stop and arrest.

United States v. Murphy, 326 F.3d 501 (4th Cir. 2003).

- Multiple outbursts and use of profanity against the district court in a brief, continuous tirade constitute only a single contempt of court offense under 18 U.S.C. § 401.

United States v. Williams, 326 F.3d 535 (4th Cir. 2003).

- Court provides detailed analysis of Armed Career Criminal definition of “serious drug offense” under 18 U.S.C. § 924(e), and finds that New Jersey convictions for possession with intent to distribute cocaine/heroin, and possession with intent to distribute heroin within 1000 feet of a school, are not predicate convictions exposing felon in possession of firearm to Armed Career Criminal status.

United States v. Jennings, 323 F.3d 263 (4th

Cir. 2003).

- Court addresses whether a person convicted of a misdemeanor crime of domestic violence under South Carolina law, but never stripped of his civil rights under state law, is subject to prosecution for possessing a firearm under 18 U.S.C. § 922(g)(9).

- Defendant argued his civil rights, although never taken away, were technically “restored” under 18 U.S.C. § 921(a)(33)(B)(ii).

- Court holds that literal application of statutory exception to liability does not apply; defendant whose civil rights were never revoked or restored cannot take advantage of the restoration exception found in statute.

United States v. Crisp, 324 F.3d 261 (4th Cir. 2003).

- Court finds under Daubert that fingerprint analysis and handwriting analysis are sufficiently reliable to allow admissibility at trial.